

UNITED
NATIONS



International Tribunal for the
Prosecution of Persons Responsible
for Serious Violations of International
Humanitarian Law Committed in the
Territory of the Former Yugoslavia
Since 1991

Case No.: IT-97-25-T

Date: 15 March 2002

Original: English

IN TRIAL CHAMBER II

Before: Judge David Hunt, Presiding
Judge Florence Ndepele Mwachande Mumba
Judge Liu Daqun

Registrar: Mr Hans Holthuis

Judgment of: 15 March 2002

PROSECUTOR

v.

MILORAD KRNOJELAC

JUDGMENT

Counsel for the Prosecutor:

Ms Hildegard Uertz-Retzlaff
Ms Peggy Kuo
Mr William Smith

Counsel for the Accused:

Mr Mihajlo Bakrac
Mr Miroslav Vasi}

B. Inhumane acts and cruel treatment

128. The Accused is charged under Counts 13 and 15 with inhumane acts as a crime against humanity pursuant to Article 5(i), and with cruel treatment as a violation of the laws or customs of war pursuant to Article 3. These charges refer to the alleged participation of the Accused in the implementation of brutal living conditions at the KP Dom while he was warden. The Prosecution claims that, as a result of these living conditions, many detainees identified in par 5.37 and Schedule D of the Indictment suffered serious physical and psychological consequences.

1. The law

129. As already stated, the general requirements with respect to Articles 3 and 5 of the Statute have been met.³⁸⁰

130. It is apparent from the jurisprudence of the Tribunal that cruel treatment, inhuman treatment and inhumane acts basically require proof of the same elements. Each offence functions as a residual category for serious charges under Articles 2, 3 and 5 respectively which are not otherwise enumerated under those Articles. The definitions adopted for each offence in the decisions of the Tribunal vary only by the expressions used.³⁸¹ The Trial Chamber therefore adopts the following definition for the offences of cruel treatment and inhumane acts as charged under Articles 3 and 5. The elements to be proved are: the occurrence of an act or omission of similar seriousness to the other enumerated crimes under the Article concerned;

³⁸⁰ See pars 60-64, *supra*.

³⁸¹ In the *Tadic* Trial Judgment, it was acknowledged that cruel treatment is treatment that is inhumane, par 723. In the *Delalic* Trial Judgment, it was held that cruel treatment carries an equivalent meaning for the purposes of Article 3 of the Statute, as inhuman treatment does in relation to grave breaches, par 552. The *Kordic and Cerkez* Trial Judgment followed this finding, par 265. The *Delalic* Trial Judgment further integrated the concept of inhumane acts pursuant to Article 5 into the context of the definition of inhuman treatment by stating that the elaborate analysis and discussion conducted in the judgment "with regard to inhuman treatment is also consistent with the concept of "inhumane acts", in the context of crimes against humanity", pars 533-534. Recently, the Appeals Chamber analysed in the context of multiple convictions whether inhuman treatment under Article 2 and cruel treatment under Article 3 contained additional elements *vis-à-vis* each other. The Appeals Chamber, in both the majority decision and the separate and dissenting opinion, came to the conclusion that the "sole distinguishing element stems from the protected person requirement under Article 2", and, respectively, that "the requirement that each offence have a unique element is therefore not satisfied", par 426 of the *Delalic* Appeals Judgment and par 51 of the Separate and Dissenting Opinion of Judge David Hunt and Judge Mohamed Bennouna. The offence of inhumane acts under Article 5 was not subject to the discussion of the Appeals Chamber.

1. the act or omission causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity; and
2. the act or omission is performed deliberately by the accused or a person or persons for whose acts or omissions he bears criminal responsibility.³⁸²

131. The assessment of the seriousness of an act or omission is, by its very nature, relative. All the factual circumstances must be taken into account, including the nature of the act or omission, the context in which it occurs, its duration and/or repetition, the physical, mental and moral effects of the act on the victim and the personal circumstances of the victim, including age, sex and health.³⁸³ The suffering inflicted by the act upon the victim does not need to be lasting so long as it is real and serious.³⁸⁴

132. The required *mens rea* is met where the principal offender, at the time of the act or omission, had the intention to inflict serious physical or mental suffering or to commit a serious attack on the human dignity of the victim, or where he knew that his act or omission was likely to cause serious physical or mental suffering or a serious attack upon human dignity and was reckless as to whether such suffering or attack would result from his act or omission.³⁸⁵

2. Findings

133. The Trial Chamber is satisfied that the brutal and deplorable living conditions imposed upon the non-Serb detainees at the KP Dom in the period from April 1992 to July 1993 (discussed below) constituted acts and omissions of a seriousness comparable to the other crimes enumerated under Article 5 and Article 3 of the Tribunal's Statute, and thus

³⁸² The Appeals Chamber in *Delalic* confirmed the definition of cruel treatment as constituting "an intentional act or omission... which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity", par 424. By comparison, inhumane acts were defined to comprise "acts or omissions that deliberately cause serious mental or physical suffering or injury or constitute a serious attack on human dignity" and which must be of "similar gravity and seriousness to the other enumerated crimes"; *Kayishema and Ruzindana* Trial Judgment, pars 151,154. The Trial Chamber in *Jelusic* appears to have confused the terms "cruel treatment", "inhumane acts" and "inhuman treatment" several times in its analysis (par 41 and finding in pars 45, 52 and the reference to "inhumane treatment" as to be that set out in Article 5) but explicitly put forward that the notions of cruel treatment within the meaning of Article 3 and of "inhumane treatment set out in Article 5" (thereby obviously referring to "inhumane acts" under Article 5) "have the same legal meaning": *Jelusic* Trial Judgment, par 52.

³⁸³ *Delalic* Trial Judgment, par 536; *Jelusic* Trial Judgment, par 57 (referring to outrages upon personal dignity).

³⁸⁴ This was recently held by the Trial Chamber with regard to the offence of outrages upon personal dignity in *Kunarac* Trial Judgment, par 501.

³⁸⁵ *Kayishema and Ruzindana* Trial Judgment, par 153; *Aleksovski* Trial Judgment, par 56.